Supreme Court, U. S.
FILED
DEC 4 1980
MICHAEL RODAK, JR., CLERK

No. 80-700

In the Supreme Court of the United States

OCTOBER TERM, 1980

ELIGAH R. ROWRY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

MICHAEL KIMMEL
C. FREDERICK GEILFUSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-700

ELIGAH R. ROWRY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the courts below correctly concluded that petitioner's inculpatory statements, made during interrogation by Japanese officials and admitted into evidence in administrative discharge proceedings, were voluntary.

2. Whether the United States Constitution prohibits use in administrative proceedings of statements obtained, without the presence of counsel, from an employee of the United States Air Force during

interrogation by Japanese officials concerning possible violations of Japanese law.

3. Whether the Status of Forces Agreement (SOFA) between the United States and Japan requires that statements obtained from an employee of the United States Air Force at an interrogation by Japanese officials be excluded in administrative discharge proceedings because counsel was not provided at the interrogation.

4. Whether there was a rational basis for the conclusion that petitioner was discharged for such cause as would promote the efficiency of the Air Force.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Baxter v. *Palmigiano*, 425 U.S. 308	5
Brewer v. *Williams*, 430 U.S. 387	5
United States v. *Mundt*, 508 F.2d 904, cert. denied, 421 U.S. 949	6
United States v. *Trenary*, 473 F.2d 680	6
United States v. *Ward*, No. 79-394 (June 27, 1980)	5, 6

Constitution and statutes:

United States Constitution	1
Fifth Amendment	6
Sixth Amendment	5, 8
Status of Forces Agreement between the United States and Japan (SOFA), June 23, 1960, 11 U.S.T. 1652	6, 7
Art. XVII:	
Paragraph 9(e), 11 U.S.T. 1666	7
Paragraph 10, 11 U.S.T. 1666	6
Minutes to Paragraph 9, 11 U.S.T. 1753-1754	7-8
5 U.S.C. 701-706	3
5 U.S.C. (Supp. II) 7511-7514	2
5 U.S.C. 7513(a)	8
5 U.S.C. (1976 ed.) 7701	2

OPINIONS BELOW

The opinion of the court of appeals is unreported (Pet. App. 15). The decision (Pet. App. 13) and judgment (Pet. App. 14) of the district court are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1980. The petition for a writ of certiorari was filed on October 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

In October 1974, agents of the Japanese Tobacco Monopoly Corporation (JTMC) obtained a statement from Tatsuro Makita, a Japanese citizen, that on five different occasions he had purchased cigarettes from petitioner, a civilian employee of the United States Air Force, in violation of the Japanese Tobacco Monopoly Law (Rec. 13-15).[1] Japanese agents related this information to the Air Force Office of Special Investigations (OSI).

In November 1974, agents of the JTMC went to Yokota Air Force Base in order to interview petitioner regarding his involvement in any illegal cigarette sales. Raymond Connolly, an OSI special agent, approached petitioner, informed him of his rights under the United States Constitution, and indicated that Japanese officials wanted to interrogate him (Rec. 16).

---

[1] "Rec." refers to the record in the court of appeals.

Agent Connolly then accompanied petitioner to the OSI office, where he was questioned by the Japanese officials. Agent Connolly did not attend the interview. Petitioner requested the presence of counsel at the interview but, pursuant to Japanese law, the request was denied (Rec. 17). Mitsuo Matsudo, an Air Force interpreter, attended all but 10 to 20 minutes of the interview, which lasted between five and six hours. At the conclusion of the questioning, the Japanese agents prepared two reports in English reflecting the interview and petitioner's responses. After Matsudo read the reports to petitioner in English, petitioner signed them. The reports contained a number of inculpatory statements. Based on the results of the JTMC investigation, petitioner was subjected under Japanese law to an administrative fine of $5,200 (Rec. 17).

Thereafter, the Air Force instituted proceedings to remove petitioner from its employ. On January 17, 1975, the Air Force issued a Notice of Final Decision discharging petitioner. Petitioner appealed that decision to the United States Civil Service Commission pursuant to 5 U.S.C. (1976 ed.) 7701.[2] In his letter of appeal to the Commission, dated January 31, 1975, petitioner admitted his "culpable involvement" with Japanese law enforcement authorities during his off hours (Rec. 15), pleaded for leniency, and requested punishment less severe than removal.

The Commission conducted a hearing on the discharge. Petitioner contended at the hearing that the inculpatory statements made during the JTMC inter-

---

[2] In 1978, the function of reviewing adverse personnel actions of federal agencies was substantially revised and was transferred from the Civil Service Commission to the Merit System Protection Board. See 5 U.S.C. (Supp. II) 7511-7514.

rogation were involuntary and were not true. He also contended that he was denied his right to counsel at this interrogation. However, because of possible self-incrimination, petitioner refused to answer questions on cross-examination concerning the truth of the statements attributed to him by the Japanese officials (Rec. 16).

The Commission found that the evidence supported the charge that petitioner had engaged in activity violating the Japanese Tobacco Monopoly Law (Rec. 17). The Commission concluded that this conduct, which had resulted in a substantial fine under Japanese law, "was a source of great embarrassment to the Department of the Air Force and the American Government and could not be condoned" (*ibid.*). Hence, the removal action taken by the Air Force "was warranted and not unreasonable" (*ibid.*).

Petitioner then brought suit in the United States District Court for the Central District of California pursuant to 5 U.S.C. 701-706 to set aside the Commission's decision. The district court granted the government's motion for summary judgment (Pet. App. 14). The court noted that, as petitioner had conceded, Japanese law did not require the presence of an attorney during interrogation of an accused (Rec. 104), that protections under the United States Constitution did not apply to the Japanese interrogation because the Air Force did not participate sufficiently in the interrogation (*id.* at 103), and that use of the inculpatory statements resulting from the interrogation did not violate petitioner's constitutional rights (*id.* at 104, 106-107). The court also found that petitioner's discharge was not unreasonable, because it affected the "ability of a United States agency to operate effectively in a foreign

country" and also affected the goodwill of the United States in Japan (*id.* at 108). The court of appeals affirmed in an unpublished order (Pet. App. 15).

ARGUMENT

1. Petitioner asserts (Pet. 10) that his interrogation by Japanese agents was such as to call into question the voluntariness and veracity of the inculpatory statements he signed. The Civil Service Commission and the courts below properly rejected this contention.

First, in a letter to the Civil Service Commission appealing his discharge, petitioner admitted his "culpable involvement" with Japanese law enforcement authorities (Rec. 15). In addition, the interpreter, who was present for all but 20 minutes of the five or six hour interrogation, testified that the statements signed by petitioner, which had been read to petitioner in English, were consistent with the interpreter's recollection of events. Further corroboration of the accuracy of these admissions was supplied by the statement of a Japanese national, Makita, who was accused of purchasing the cigarettes from petitioner.[3]

The district court gave consideration to petitioner's claim of forced confession. Its conclusion that the statements were voluntarily made is fully supported by the record, and the court of appeals properly af-

---

[3] Petitioner asserts (Pet. 8) that Makita later retracted his statement. The district court correctly concluded that the Commission had discretion to believe the original statement rather than the retraction (Rec. 7-8). The fact that Makita did not provide Japanese authorities with the retraction lends support to the credibility resolution made by the Commission and accepted by the district court.

firmed. This fact-bound question does not warrant further review.[4]

2. Petitioner contends (Pet. 10-11) that his Sixth Amendment right to counsel was violated because of what he asserts to have been participation by agents of the United States Government in his arrest and interrogation. But petitioner's statements were introduced in an administrative proceeding, not a "criminal prosecution" in which Sixth Amendment protections attach. See *United States* v. *Ward*, No. 79-394 (June 27, 1980), slip op. 5.[5] Therefore, even assuming that agents of the United States participated in petitioner's interrogation and that such participation was sufficient to invoke constitutional protections,[6] petitioner's Sixth Amendment claim is without merit.

---

[4] In addition, during the Commission proceeding, when asked about the truth of the statements at the interrogation, petitioner refused to respond on the ground of self-incrimination. This Court recently recognized the propriety of drawing adverse inferences against parties in civil proceedings when they refuse to explain probative evidence offered against them. *Baxter* v. *Palmigiano*, 425 U.S. 308, 318-319 (1976).

[5] Moreover, it does not appear that criminal proceedings had been initiated against petitioner under Japanese law at the time of the interrogation. Hence, petitioner's Sixth Amendment rights did not attach, even if the Amendment were held to apply to the use in civil proceedings of a statement obtained by Japanese agents. See *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977).

[6] The involvement of United States agents in the interrogation was insufficient to make the constitutional requirement of right to counsel applicable. The initiative for the interrogation came from Japanese authorities, and petitioner was interrogated only by Japanese authorities and only con-

Petitioner also asserts that his due process rights were violated by the interrogation, but he does not identify in what manner. To the extent that he argues that use of the statements obtained in the interrogation violated his Fifth Amendment privilege against compelled self-incrimination, the answer is that the Fifth Amendment prohibits such use only in a "criminal case." *United States* v. *Ward*, *supra*, slip op. 5. Use of the statements in an administrative discharge proceeding therefore would not violate the privilege. In any event, the evidence shows that the statements were obtained voluntarily. See pages 4-5, *supra*. Moreover, given the voluntariness of the statements, it cannot be argued that use of the statements in administrative proceedings violated some more general due process right barring the use of coerced statements in such proceedings.

3. Petitioner contends (Pet. 9-10) that Japanese agents violated the Status of Forces Agreement between the United States and Japan (SOFA), June 23,

---

cerning violations of Japanese law. The OSI was contacted to serve as a liaison, to meet petitioner, and to conduct a search on the Air Force Base pursuant to a Japanese search warrant. Such cooperation is consistent with, if not required by, the Status of Forces Agreement between the United States and Japan, June 23, 1960 (Art. XVII, Paragraph 10, 11 U.S.T. 1666). Agent Connolly did not participate in any way in the interrogation itself. The fact that the interview was conducted on a United States Air Force Base and a United States interpreter was present does not make the interrogation action of the United States. *United States* v. *Mundt*, 508 F.2d 904, 906-907 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975); *United States* v. *Trenary*, 473 F.2d 680 (9th Cir. 1973) (fact that United States official served as interpreter at interrogation given little weight). Nor is there any indication that discharge proceedings were contemplated at the time of the interrogation.

1960, 11 U.S.T. 1652 (1960) (Pet. App. 20-21), by not affording him counsel at the interrogation and not recognizing his privilege against self-incrimination. Article XVII, Paragraph 9(e) of SOFA (Pet. App. 20-21; 11 U.S.T. 1666) provides (emphasis added):

> Whenever a member of the United States armed forces, the civilian component or a dependent *is prosecuted* under the jurisdiction of Japan he shall be entitled:
>
> * * * * *
>
> (e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan.

The treaty on its face limits the specified procedural protections to persons who are being "prosecuted," and does not appear to extend such protections to persons who are merely under investigation. Likewise, the minutes accompanying Paragraph 9 of SOFA (Pet. App. 21; 11 U.S.T. 1753-1754) reveal that the rights enumerated in that paragraph are guaranteed to persons "on trial" (Pet. App. 20-21). It is clear that petitioner was not "on trial," but was only undergoing initial interrogation as a suspect.[7]

---

[7] Petitioner maintains (Pet. 9) that SOFA provides that the right to counsel attaches upon arrest or detention. However, Paragraph 9 of SOFA itself provides only that when a United States employee "is prosecuted," he shall have the right to legal representation "under the conditions prevailing for the time being in Japan." The language on which petitioner relies appears in the *minutes* to Paragraph 9. The minutes provide that in addition to rights enumerated in SOFA, United States employees shall have such rights as are guaranteed under Japanese law, including the Japanese

However, even if petitioner's interrogation without counsel violated SOFA as it pertained to a possible prosecution under Japanese law, it would not follow that use of the statements in administrative discharge proceedings was improper. The Sixth Amendment right to counsel is not violated by use of uncounseled statements in proceedings that are not "criminal prosecution[s]" within the meaning of that Amendment, and there is, accordingly, no reason to believe that the parallel provision in SOFA was intended to fashion an implicit exclusionary rule in such noncriminal proceedings.

4. Petitioner argues (Pet. 11) that the Air Force has not demonstrated a rational basis for its conclusion that his discharge will promote the efficiency of the Air Force, as required under 5 U.S.C. 7513(a). This claim is insubstantial. Petitioner committed a serious violation of Japanese law. Such disregard for the laws of a foreign nation by a civilian employee of the Air Force stationed in that nation causes significant embarrassment to the Air Force and the United States and adversely affects relations between the two countries. The Air Force plainly had a rational basis for petitioner's discharge.

---

constitutional right to counsel at arrest or detention. Thus, SOFA itself does not guarantee this right. Moreover, petitioner conceded in the administrative proceedings that there is no right to counsel under Japanese law at interrogation of a suspect (Rec. 16, 104). Similarly, the privilege against compelled self-incrimination, which petitioner also asserts is protected by SOFA (Pet. 9), is among the rights listed in the *minutes* as guaranteed by the Japanese constitution; it is not listed in SOFA itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

MICHAEL KIMMEL
C. FREDERICK GEILFUSS
Attorneys

DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333836 174